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In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. ~~1078~~ 183

TOMMASO ARGENTO,
Petitioner,

vs.

HERBERT A. HORN, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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PETITION FOR A WRIT OF CERTIORARI
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Now come Henry C. Lavine and Anthony R. Fiorette, Attorneys for Tommaso Argento, and pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, which Court affirmed the order of petitioner's extradition to Italy.

OPINIONS BELOW.

The opinion of the Court of Appeals (Appendix p. 35, *infra*), is reported at 241 F. 2d 258. The memorandum of the District Court (Appendix p. 45, *infra*), is reported at 131 Fed. Supp. 538.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 12th, 1957 (Appendix p. 45). A timely petition for rehearing was denied on April 8th, 1957 (Appendix p. 45, *infra*). The Appellate Court extended the time to file a Petition for a Writ of Certiorari in the Supreme Court of the United States to June 14th, 1957. The jurisdiction

of this Court is invoked under 8 U. S. C. 22; 8 U. S. C. 1304 (b); 18 U. S. C. 3181; and 18 U. S. C. A. 3184.

QUESTIONS PRESENTED.

1. Whether in this extradition case it was sufficient in law for the Commissioner to order petitioner extradited to Italy without obtaining positive identification of petitioner, made in the presence of such Commissioner and petitioner, to the effect that this petitioner was the man who was tried and convicted in absentia in Italy.

2. Whether it is sufficient identification upon which to base an extradition order when the evidence consists only of three affidavits made in Italy by persons who have not seen this petitioner for more than thirty years, and identification by these people being made merely from a blown-up photograph obtained in the United States twenty years after the alleged homicide.

3. Whether identification of this petitioner can be upheld on a claim that he was one of eleven persons (three bearing the name Tommaso Argento), who were convicted in 1931, the petitioner in absentia, without a witness testifying in open court or before the Commissioner and making a positive identification under this set of facts.

Our answer to the above three questions is that it was insufficient in this case.

4. Whether the Congress of the United States was empowered in ratifying a peace treaty with Italy, effective September 15, 1947, the form of which was followed as is provided in Article 44:

> "a. Each allied or Associated Power will notify Italy, within a period of six months from the coming into force of the present Treaty, which of its pre-war bilateral treaties with Italy it desires to keep in force or revive. Any provisions not in conformity with the

present Treaty shall, however, be deleted from the above-mentioned treaties.

"b. All such treaties so notified shall be registered with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations.

c. All such treaties not so notified shall be regarded as abrogated."

5. Whether such treaty was in full force and effect merely by the acts of the Secretary of State of the United States in notifying the Republic of Italy that the United States desired to keep in force and revive among others the Extradition Treaty of 1868. Or, whether such act on the part of Congress, permitting the Secretary of State to act merely by notification to Italy of intent to make effective the old extradition treaty, was an illegal act because the law required that a treaty must be initiated by the President of the United States and approved by two-thirds of the Senate of the United States, and whether such act on the part of the Secretary of State usurped the power of the Chief Executive and the United States Senate.

6. Whether this Extradition Treaty of 1868 survived the war, whether Article 44 of the Peace Treaty effective as of September 15th, 1947, could grant power to the Secretary of State to by-pass the Constitutional provisions for making a treaty and whether that can be accomplished legally by a mere notification to the other power that the United States desires the revival of certain sections of the old treaty.

7. Whether such alleged extradition treaty created in the manner above described can be considered as a lawful extradition treaty between the United States and Italy, or whether it is proper to hold that such acts of the Secretary of State are insufficient in law because they by-pass the

required action by the Chief Executive, with the approval of the United States Senate, and therefore are illegal, and whether it must be held that there is no extradition treaty in existence between the two countries.

Our answer to the above four questions is that the United States Senate should have made and approved a new treaty at the request of the Chief Executive, and that Article 44 of the Peace Treaty with Italy, effective as of September 15th, 1947, which Congress approved, amounts to a delegation of its power to the Secretary of State, who, by mere notification to the Italian Government, by-passed the law provided for under the Constitution of the United States.

STATUTES INVOLVED.

8 U. S. C., 22:

> "All official files, documents, records and information in the office of the Department * * * or in the custody or control of any officer or employee of the Department of Justice, are to be regarded as confidential. No officer or employee may permit the disclosure or use of the same for any purpose other than for the performance of his official duties, except in the discretion of the Attorney General * * *."

8 U. S. C., 1304(b):

> "All registration and fingerprint records made under the provisions of this title shall be confidential, and shall be made available only to such persons or agencies as may be designated by the Attorney-General."

18 U. S. C., 3181:

> "The provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during

the existence of any treaty of extradition with such foreign Government."

18 U. S. C. A., Section 3184: Fugitives from foreign country to United States.

"Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any commissioner authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention; he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

CONSTITUTION.

Constitution of the United States, Art. II, Sec. 2:

"He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur. * * *"

STATEMENT OF FACTS.

In 1868 a Treaty of Extradition between the United States and Italy was entered into and became effective on September 17, 1868. Thereafter amendments, not here pertinent, were made thereto in 1869 and in 1885. On December 11th, 1941, the Congress of the United States declared that a state of war existed between the United States and Italy. At the conclusion of the war a treaty of peace was concluded, effective September 15th, 1947. 61 Stat. 1245. This peace treaty, which was duly ratified by the United States Senate, provided in Article 44 as follows:

> "1. Each Allied or Associated Power will notify Italy, within a period of six months from the coming into force of the present Treaty, which of its pre-war bilateral treaties with Italy it desires to keep in force or revive. Any provisions not in conformity with the present Treaty shall, however, be deleted from the above-mentioned treaties.
>
> "2. All such treaties so notified shall be registered with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations.
>
> "3. All such treaties not so notified shall be regarded as abrogated." 61 Stat. 1386.

On February 6th, 1948, the Secretary of State of the United States notified the Republic of Italy that the United States desired to keep in force and revive, among others, the Extradition Treaty of 1868, as amended.

In March, 1954, at the request of Folco Zugaro, Consul for the Republic of Italy, a Warrant of Arrest for the extradition to Italy of one Tommaso Argento was issued by Herbert A. Horn, United States Commissioner at Cleveland, Ohio.

About one year later, on March 14, 1955, this petitioner was brought before said Commissioner after being

apprehended and detained by Xavier North, United States Marshal, allegedly pursuant to said Warrant of Arrest.

On latter date, said Commissioner granted requests for continuance, and thereafter granted further continuances to June 21, 1955 and from that date to July 11, 1955.

In the meantime, on April 5, 1955, petitioner filed application for Writ of Habeas Corpus in the United States District Court, Northern District, Eastern Division of Ohio, maintaining thereby that the Commissioner was without jurisdiction to hear and decide said extradition proceeding; and asserting in said application that no valid treaty relating to the extradition of persons existed between the United States of America and the Republic of Italy, and that in absence of such treaty the imprisonment and detention of petitioner was without authority in law, and in violation of due process of law.

After hearing had, said Court on May 26, 1955, denied the Writ of Habeas Corpus and held there was a valid and existing treaty between said Nations relating to the extradition of persons.

Thereafter, on June 21, 1955, the extradition proceeding came on for hearing before said Commissioner who held a valid extradition treaty existed between said nations, and then continued the hearing to July 11, 1955 after sustaining objections made by petitioner to the admission in evidence of certain documents.

Upon resuming the hearing on July 11, 1955, said Commissioner admitted in evidence, over petitioner's objections, Exhibits F, G1, G2, and G3, purporting to establish petitioner as being the person named in the aforementioned Warrant of Arrest. Also were admitted Exhibits H, H1, H2 and H3. Exhibits so admitted in evidence are identified and described as follows:

Exhibit F—a large photograph with three similar statements written in Italian attached thereto. This photograph is a blow-up or enlargement made from a passport size photograph attached to, and a part of, the official Alien Registration Record identified as Exhibit K. Said Alien Registration Record, confidential by law, was made available for such enlargement without the express authorization or designation by the Attorney-General as required by the provisions of Paragraph (b), Section 1304, Title 8 U. S. C. Thereafter, and while the hearing was recessed said large photograph, obtained as aforesaid, was sent to Italy whereat the written statements identified as Exhibits G1, G2 and G3 were attached thereto and thus returned for presentation in evidence.

Exhibits G1, G2 and G3—are English translations of said three statements written in Italian and allegedly made by Onorfio Sacco, Antonio Sacco and Giuseppe Camelleri, respectively, on June 27, 1955, before the Marshal of Police at Ioppolo Giancaxio, Sicily. Said statements were made while the hearing before the Commissioner was recessed and without any notice to, or knowledge of, this petitioner or his counsel. Said statements were not made pursuant to any judicial process or deposition. Petitioner was not afforded an opportunity to be represented at the taking of said statements.

Petitioner objected to the admission in evidence of Exhibits F, G1, G2 and G3.

Exhibit H—is an old photograph, from an unidentified source, of an unidentified young man with three statements written in Italian attached thereto, H1, H2 and H3.

Exhibits H1, H2 and H3—are English translations of said three statements written in Italian and also allegedly made by Onorfio Sacco, Giuseppe Camelleri and Antonio

Sacco, respectively, on June 27, 1955, before the Marshal of Police at Ioppolo Giancaxio, Sicily. Said statements attached to photo H were made while the hearing before the Commissioner was recessed and without any notice to, or knowledge of, petitioner or his counsel. Said statements were not made pursuant to any judicial process or deposition. Petitioner was not afforded an opportunity to be represented at the taking of said statements.

Petitioner objected to the admission in evidence of Exhibits H, H1, H2 and H3.

Also admitted in evidence, over objection, were the following exhibits:

Exhibit J—Alien Registration form executed on December 23, 1940, at Cleveland, Ohio, and containing print of right index finger.

Exhibit K—Alien Registration record executed on February 27, 1942, at Cleveland, Ohio, which has attached thereto a passport-size photograph and the print of right index finger.

Exhibit K1—Another Alien Registration record executed in 1942, at Cleveland, Ohio.

A witness called by the Republic of Italy was one James A. Benasek, a member of the Police Department of the City of Cleveland, Ohio. He testified that in his opinion the fingerprint appearing on Exhibit K and Exhibit I, both made at Cleveland, Ohio, are of the same person; that the large photograph marked Exhibit F was a blow-up of the small photograph attached to, and a part of, Exhibit K, all made at Cleveland, Ohio.

Exhibit I—is a document containing petitioner's fingerprints taken by the U. S. Marshal before the hearing opened on July 11, 1955.

Thereupon, the said Exhibits I, J, K and K1 were offered and admitted in evidence over the objections thereto by petitioner.

From only the foregoing evidence procured as aforesaid the Commissioner found on July 11, 1955 at the conclusion of said hearing that petitioner was the person named in the Warrant of Arrest for extradition to Italy, and prepared to certify his findings accordingly as provided by law.

On July 20, 1955, petitioner filed a petition for Declaratory Judgment naming Herbert A. Horn, United States Commissioner, Xavier North, United States Marshal, and Folco Zugaro, Consul for the Republic of Italy, as defendants, and asserting in substance that there was no legal evidence to support either the Commissioner's findings or order, and that there was no legal evidence to sustain the charge recited in said Warrant of Arrest; and, that the imprisonment and detention of plaintiff was without due process of Law and prayed for judgment accordingly, and that pending final determination by the Court, each defendant be enjoined from proceeding further as prayed for.

On August 4, 1955, the District Court, after hearing had, denied petitioner's petition for Declaratory Judgment holding the Commissioner's findings and resultant order were proper.

On December 5, 1955, proceedings for appeal to the United States Court of Appeals for the Sixth Circuit were duly made and completed.

On February 12, 1957, the United States Court of Appeals rendered a decision affirming the District Court.

ARGUMENT.

1. Whether in this extradition case it was sufficient in law for the Commissioner to order petitioner extradited to Italy without obtaining positive identification of petitioner, made in the presence of such Commissioner and petitioner, to the effect that this petitioner was the man who was tried and convicted in absentia in Italy.

2. Whether it is sufficient identification upon which to base an extradition order when the evidence consists only of three affidavits made in Italy by persons who have not seen this petitioner for more than thirty years, and identification by these people being made merely from a blown-up photograph obtained in the United States twenty years after the alleged homicide.

3. Whether identification of this petitioner can be upheld on a claim that he was one of eleven persons (three bearing the name Tommaso Argento), who were convicted in 1931, the petitioner in absentia, without a witness testifying in open court or before the Commissioner and making a positive identification under this set of facts.

Our answer to the above three questions is that it was insufficient in this case.

We maintain that there was no evidence, quantitatively or qualitatively, to support this extradition warrant against Tommaso Argento that was submitted to the United States Commissioner in the Northern District of Ohio, and he should have been discharged.

Petitioner is a man who has lived here for thirty-one years. He left Italy in 1926. Here is a claim that a murder was committed in Italy sometime in 1922 in a town named Ioppolo Giancaxio, Sicily (population about 4000). After this murder was committed this petitioner, Tommaso Argento, continued to live in that same town for about four

years thereafter, and nothing happened. Nearly ten years after this murder a trial was had in Italy involving eleven persons including the petitioner who were found guilty of this offense. Among these eleven defendants were three persons bearing the name Tommaso Argento, who were then and there tried in absentia.

The record is silent as to why nothing was done or attempted to be done to this petitioner, Tommaso Argento, who continued to live in this same city where this alleged murder was committed from 1922 to 1926. Then again, the record is silent as to why it took an additional five to six years after his leaving Italy before this mass trial for murder was held, which included three persons bearing the name Tommaso Argento, who were convicted in absentia. While the record is silent on that point, our memory, however, does go back to the days of Mussolini during the years 1920, 1921, 1922, up until the date of his death, and one wonders whether the political ramifications of the Fascists in the Mussolini regime were responsible for the unusual and almost unheard of actions in the mass political trials that were held in Italy during those years. While we again say the record was silent on these points, to us it speaks very loudly and asks the question, why did four years elapse between the time of the alleged murder and the time of this Tommaso Argento's leaving his village in Sicily without the authorities doing anything about Tommaso Argento if he were involved in such murder? Secondly, what about the length of time, nearly ten years, between the time of the alleged murder and this mass trial with convictions in absentia?

To one old enough to have lived during those years, considering the revolutionary and the counter-revolutionary intrigues of those days, no surprise is created when one happens onto a case where the facts and the doings of

those in authority indicate political skulduggery, revenge, and vendettas on the part of those who have a selfish desire and motive that remains unexplained and unaccounted for—in this case a possible family vendetta, as indicated by the affidavit of one of the affiants, a brother of the deceased.

It is highly proper to raise these suspicions in this case before us because of the very manner in which the extradition order is being sought. The years that elapsed, the unexplained reasons for failure to act when this petitioner still lived in his own town for years after the alleged murder, followed by the crude attempt at identification of a blown-up photograph, an enlargement of a small one taken in the United States twenty years after the crime, a photograph of a man whom the people attempting to make the identification have actually not seen for *thirty-one years*, in itself raises a repugnant feeling in the minds of persons interested in fair play when that kind of an effort is made in a case which involves a life sentence for a man who, it is generally admitted by all sides, is a person of good repute, as found on page 8 of the United States Court of Appeals Opinion:

> "The appellant has apparently been a law-abiding person during the thirty years that he has been in this country."

For Italy to attempt to obtain extradition of this man without even sending someone who knew him, who could sit in the Court and identify him, if he so believed, as being the person who had been convicted in absentia, is very high-handed and improper conduct, and this is true regardless of sanction in some extradition cases—but not with this factual background. If such a person would appear it would give counsel the opportunity to cross-examine and ascertain the facts and the underlying reasons

and motives for these unexplained events, or possible family feuds as mentioned before, and would at least satisfy the minds of the persons who want to see fair play.

To permit the Italian Government to do such a thing, to send in three affidavits that were taken without the knowledge or the presence of the petitioner or his counsel, without giving an opportunity to cross-examine in order to help to arrive at a truthful solution, if possible, in a case with this factual background would merely aid and abet some political scheme steeped in Fascist machination or vengeance seeker to obtain in such improper manner and by such unfair methods, the fruits that the Italian Government or this particular individual is not entitled to and is obtaining under false pretenses.

To go a step further, if Pennsylvania or Indiana or any other state in the United States would request the extradition of a person from Ohio on any criminal charge, it would send to Ohio a warrant or indictment and with it at least one witness who would face the accused and swear before the Commissioner or the Court that the prisoner is the person named in the warrant or indictment returned by the Grand Jury. Such is our procedure in every extradition case that is contested, even in cases with a much lesser charge than homicide. Then why make an exception in this one? Why set such a dangerous precedent?

We contend that written statements (Exhibits H1, H2 and H3), *not made pursuant to, or under, any judicial process or scrutiny are wholly hearsay* and of no probative value, and do not constitute legal evidence.

The next question is, is hearsay evidence, standing alone, competent and legal evidence in an extradition case such as this? The answer, of course, is no. It is not competent and sufficient evidence upon which to base an extradition. There must be a residuum of legal evidence. There

must be in the record some evidence of a sound, competent and recognizedly probative character to *sustain the finding of identity*. Where the finding of identity is not supported by *substantial evidence* it will be set aside. See *Vajtauer vs. Commissioner of Immigration*, 273 U. S. 103.

Of the numerous cases on extradition that we have examined, *not one was found* where hearsay evidence was the only evidence presented to establish identity. In each case there is some legal evidence. Always something more than mere hearsay or wholly incompetent evidence. It must be remembered that in the case at bar there was no oral testimony as to identification and no deposition was taken. Just three statements, all alike *not made pursuant to any judicial process or deposition* is all the evidence on identification that was introduced in this case and nothing else is before the Court except these three statements identifying a photograph of a man these three persons have not seen for about thirty-one years. We do contend that something more than mere hearsay or wholly incompetent evidence, as is before this Court, is necessary before an extradition may be upheld.

In *Re: Fowler*, 4 Fed. 303, 317, the Court speaks of a deposition and oral testimony.

In *Ex Parte: Glaser*, 176 Fed. 702, 704, reference is made *to depositions*.

In *Voloshin vs. Ridenour*, 299 Fed. 134, 139, there is mention made of *depositions* and *other documents*.

In *Bagley vs. Starwich*, 8 Fed. (2) 42, the Court speaks of the *photograph being attached* as an exhibit *to the depositions*.

In *Re: McPheen*, 30 Fed. 57, the identity was established by the *testimony of the officer* who came from Calcutta, India.

In *Lo Pizzo vs. Matheus*, 36 Fed. (2) 565. 567, *witnesses in open Court* identify the respondent, and there was a *mass of depositions.*

In *Ex Parte: Romano*, 40 Fed. (2) 750, the photograph was attached *to a deposition.*

In *Klein vs. Mulligan*, 50 Fed. (2) 687, 688, the *depositions* were taken in England.

In *Collier vs. Vaccaro*, 51 Fed. (2) 17, 20, all of the evidence offered *was by deposition.*

In *Ex Parte: Davis*, 54 Fed. (2) 723, 724, there is the testimony *of eye witnesses.*

In *Caputo vs. Kelly*, 19 Fed. Supp. 730, 734, *fingerprints taken in France* were compared with *fingerprints taken on occasions when he was under arrest in New York* (affirmed 92 Fed. (2) 603).

In *Gluckman vs. Henkel*, 221 U. S. 508, 513, a photograph was identified by the Russian magistrate, and this, with the convergence of other facts, was regarded adequate.

In *Bingham vs. Bradley*, 241 U. S. 511, 513, the Court speaks of *certain depositions of witnesses.*

In *Re: Lo Dolce*, 106 Fed. Supp. 455, 456, the facts were supported by the *written and oral confessions* of Lo Dolce and the testimony of numerous individuals.

In *Ex Parte Fudera*, 162 Fed. 591, **Italy, then a Kingdom, initiated an extradition proceeding for a homicide relying, as in this case, on statements made by or in the presence of police officers in Sicily. The Court held, there was nothing in the evidence to connect the prisoner with the crime but pure hearsay statements of police officers, on which no magistrate in this Country could commit anyone for a crime charged to have been committed there.**

Exhibits G1, G2 and G3 are wholly hearsay and unsupported by any competent legal evidence. Said statements were made in secrecy, during a recess of the hearing, by the three named individuals to a police officer in Sicily in which they claim to identify a person they did not see, and could not have seen for thirty years. *Said statements were not made pursuant to a Court order or under judicial scrutiny or by deposition.* Such is the character of the evidence purporting to identify the person represented by photograph Exhibit F. Wholly unreliable and of no probative value.

In *Reamer vs. U. S.*, 229 Fed. (2) 884, the testimony in question was given in open Court by a witness present at the scene of the crime. It was not hearsay, as in our case, yet it was held to be not sufficient substantial evidence to identify the defendant. In our case the evidence is wholly hearsay, unsupported by any probative evidence and is therefore twice objectionable; it is both inadmissible and insufficient.

Regardless that the law of evidence in other countries may differ somewhat from ours in certain particulars, it is clear that all Courts insist upon reliable, substantial and probative evidence to establish identity. Evidence that is wholly hearsay is not reliable, is not substantial and is not of probative value anywhere and cannot become the basis for an extradition order.

For reasons stated the admission in evidence of Exhibits G1, G2 and G3 unsupported by any competent legal evidence was reversible error and a denial of due process of law.

We repeat, that whatever weight a Court may desire to give to a blow-up of a photograph introduced as the sole means of identification, the Court must, in weighing

that evidence, take into account the fact that the people who made the identification in Italy, one of whom, Fr. Giuseppe Camelleri, a brother of the deceased who no doubt has a great and personal interest and motive in this case, have actually not seen the accused for about thirty-one years. They were only able to see a blow-up of a small photograph which was taken in the United States and attached to a document from which it was surreptitiously taken and blown-up and sent to Italy during a recess in the very hearing which was then taking place before the United States Commissioner, and under such circumstances this identification was made and relied upon to issue the order of extradition.

We do not hesitate to say that in our opinion such an order of extradition, based upon such flimsy and hearsay evidence, without more, was illegal and was in violation of due process of law.

We believe the answer to the above questions is that there is a lack of any evidence sufficient to establish the identification of this Tommaso Argento, one of three named in the case, two of them convicted in absentia and the third at the trial.

4. Whether the Congress of the United States was empowered in ratifying a peace treaty with Italy, effective September 15, 1947, the form of which was followed as is provided in Article 44:

> **"a. Each allied or Associated Power will notify Italy, within a period of six months from the coming into force of the present Treaty, which of its pre-war bilateral treaties with Italy it desires to keep in force or revive. Any provisions not in conformity with the present Treaty shall, however, be deleted from the above-mentioned treaties.**

"b. All such treaties so notified shall be registered with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations.

"c. All such treaties not so notified shall be regarded as abrogated."

5. Whether such treaty was in full force and effect merely by the acts of the Secretary of State of the United States in notifying the Republic of Italy that the United States desired to keep in force and revive among others the Extradition Treaty of 1868. Or, whether such act on the part of Congress, permitting the Secretary of State to act merely by notification to Italy of intent to make effective the old extradition treaty, was an illegal act because the law required that a treaty must be initiated by the President of the United States and approved by two-thirds of the Senate of the United States, and whether such act on the part of the Secretary of State usurped the power of the Chief Executive and the United States Senate.

6. Whether this Extradition Treaty of 1868 survived the war, whether Article 44 of the Peace Treaty effective as of September 15th, 1947, could grant power to the Secretary of State to by-pass the Constitutional provisions for making a treaty and whether that can be accomplished legally by a mere notification to the other power that the United States desires the revival of certain sections of the old treaty.

7. Whether such alleged extradition treaty created in the manner above described can be considered as a lawful extradition treaty between the United States and Italy, or is it proper to hold that such acts of the Secretary of State are insufficient in law because they by-pass the required action by the Chief Executive, with the approval

of the United States Senate, and therefore are illegal, and whether it must be held that there is no extradition treaty in existence between the two countries.

Our answer to the above four questions is that the United States Senate should have made and approved a new treaty at the request of the Chief Executive, and that Article 44 of the Peace Treaty with Italy, effective as of September 15th, 1947, which Congress approved, amounts to a delegation of its power to the Secretary of State, who, by mere notification to the Italian Government, by-passed the law provided for under the Constitution of the United States.

We contend that no valid treaty existed between the United States of America and the Republic of Italy relating to the extradition of persons, and that in the absence of such a treaty, there is, and can be, no authority in law for the arrest, detention and surrender of any person to the Republic of Italy.

That in the absence of a valid treaty and extradition, no authority in law exists for the detention and surrender of any person is firmly established by Statute, Section 3181, Title 18 U. S. C., which provides:

> "The provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such foreign Government."

And our Courts have recognized this to be the law, as evidenced by *Valentine, etc. vs. U. S. ex rel. Neidecker*, 299 U. S. 5, 9, holding, as it did, that the Act of Congress defining the procedures in extradition cases confers no power on the executive to surrender any person to a foreign Government where no extradition treaty or convention provides for such surrender.

In 1868 a treaty of extradition between the United States and Italy became effective September 17, 1868. Thereafter amendments, not here pertinent, were made thereto in 1869 and 1885. As amended, said treaty remained in full force and effect to December 11, 1941. On latter date the Congress of the United States declared, by resolution duly enacted, that a state of war existed between the United States and Italy. Upon declaration of war the treaty ceased to exist, and it has not, to this date, been legally re-established.

Therefore, World War II abrogated the prior treaty of 1868, as amended, between the nations. Because of the intrinsic nature of extradition treaties, they cannot survive the outbreak of war. They are incompatible by their very provisions with a state of all-out hostilities. *Re: Sophie Rickmers*, 45 Fed. (2) 419; *Techt vs. Hughes*, 229 N. Y. 222. In each case the Court stated that treaty provisions compatible with a state of hostilities, unless expressly terminated, will be enforced, and those that are incompatible will be rejected. Treaties compatible with open hostilities are not here in controversy, and the fact that such treaties, or provisions thereof, have been held to survive war should not be permitted to confuse the issue before the Court.

When war is declared an extradition treaty ceases to exist and the contracting parties have no further obligation thereunder. In his works on International Law, Westlake, a widely recognized authority, presents a scholarly treatment of the effect war has on treaties, and his views were adopted by the Supreme Court in *Karnuth vs. U. S.*, 279 U. S. 231, 240:

> "Westlake classifies treaties not affected by war as (1) those providing what is to be done in a state of war, (2) transitory or dispositive treaties, including such as are intended to establish a permanent condi-

tion of things, such as treaties of cession, boundary, and recognition of independence, as well as those having no conceivable connection with the causes of war or peace, and (3) treaties establishing arrangement to which third powers are parties such as guarantees and postal and other unions. Westlake, International Law, Part II, pp. 29-32. He then says:

"Outside of the exceptions which have been discussed, treaties between belligerents do not survive the outbreak of the war. At the peace there is no presumption that the parties will take the same view as before the war of their interests, political, commercial or other. It is for them to define on what terms they intend to close their interlude of savage life and to reenter the domain of law."

That, in our opinion, means a new Extradition Treaty rather than a mere direction to the Secretary of State to notify the Italian Government which of the old provisions shall be in force because the Extradition Treaty of 1868 with Italy is not within any one of the exceptions mentioned by Westlake and which was adopted by the Supreme Court. It did not survive the outbreak of war.

Treaties which have survived the war are valid and subsisting, and their continued legal life we concede is essentially a political question as stated in *Clark vs. Allen*, 331 U. S. 503, and in *Terlinden vs. Ames*, 184 U. S. 270.

But treaties which did not survive, which became extinct, annulled and lifeless are required to be re-enacted in accordance with Constitutional formalities. The State Department or the executive acting alone cannot bring back to legal life a law that has been repealed or annulled.

In the *Terlinden* case no war had intervened, so the extradition treaty with Prussia 1852 had not become abrogated, extinct or annulled. Its continued existence

when Prussia entered the German empire, the Court said, was political. With that we have no quarrel, as it did not involve revival, it had never ceased to exist.

In the *Clark* case the treaty there involved, the Court found, survived the outbreak of war. It was not by its nature incompatible with war, and hence its legal life was not extinguished, and its continued existence was a political question. In this we also agree as we do with *Society for Propagation of the Gospel vs. New Haven*, 8 Wheat. (U. S.) 464, 5 L. Ed. 662, holding that treaties stipulating for permanent rights and professing to aim at perpetuity and to deal with the case of war as well as peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts.

But, the Extradition Treaty of 1868 was incompatible with war, it did cease on the occurrence of war and thereby was repealed and annulled. The Peace Treaty of 1947 did not specifically revive it, nor did it automatically revive it. The peace treaty provides it *may* be revived by the Allied Power. What does that mean?

It can only mean that it may be revived within the framework of the legal requirements of each Allied Power. Each to its own as it were. In the United States it means as provided by the Constitution. There is no other way to make a treaty; "by and with the advice and consent of the Senate," is the mandate. Before a treaty can become a law, the Senate in whom rests the authority to ratify it must agree to it. *Haver vs. Yaker*, 76 U. S. 32, 35.

In *Crandall* (2 ed.) *Treaties, Their Making and Enforcement*, it is stated on page 94:

> "The authorization of the Senate is a condition precedent to the validity of the treaty, and is regularly given after its negotiation in the form of a resolution advising and consenting to ratification."

It is inconceivable that it would be urged in any Court that an administrative official of any branch of our Government could, by his own act and choice, bring back to legal life a statute once repealed and annulled. We respectfully so say without intending to assail anyone's integrity or motives. Can one visualize a Governor of any state giving notice and proclaiming to the people thereof, that such and such a statute, now annulled and repealed, I hearby revive and keep in force and effect in this state? Well, that is precisely what is claimed for the extradition treaty of 1868 as we see it. Nor can it be argued that the U. S. Senate in ratifying the Peace Treaty of 1947 delegated authority to the executive to bring back to legal life a law repealed and annulled by war.

In attempting to revive the abrogated treaty of 1868 the constitutional requirements were not observed. The peace treaty with Italy appropriately authorized by the President, was duly consented to by the Senate and became effective September 15, 1947 (61 U. S. Statutes, p. 1754). On April 16 and 17, 1946, there was an exchange of notes between David McKey, American Charge d'Affairs ad Interim and Alcedes DeGasperi, Royal Ministry of Foreign Affairs (61 U. S. Statutes at Large, p. 3687), whereby an agreement was made respecting the reciprocal application of Article I of the Extradition Convention of March 23, 1868, and by the terms of said agreement, same became effective April 17, 1946. In substance said agreement was an amendment to the 1868 Treaty.

Then on February 6, 1948, the Secretary of State notified the Republic of Italy that the United States desired to keep in force and revive, among others, the Extradition Treaty of 1868. And that was all. No submission to the Senate. No deliberations thereon were had

in the Senate. No advice, no consent to the ratification thereof.

Thus, the Secretary of State, without Senate action, made the choice, made an amendment thereto, and now it is claimed that subject treaty is the Supreme Law of the land. With this claim we vigorously disagree, and we feel we are supported in our contention by one hundred seventy-seven years of Constitutional history. The United States Senate is without power either to alienate or to delegate the treaty-making duties imposed on it by the Constitution.

The finding, by the Appellate Court, that the Extradition Treaty between the United States and Italy does not fit into either of the alternative classifications set out in the "*Karnuth*" opinion is not correct.

That portion of the opinion quoted by this Court and forming the basis for its finding, set forth only two classifications of treaties with respect to the effect of war, namely:

(1) Treaties which survive war, and

(2) Treaties which are absolutely annulled by war.

A finding that subject treaty would not survive war was indicated. But, the finding that said treaty was not one of those abrogated by war was erroneous, and necessarily led the Court to the further error of placing subject extradition treaty in an unrecognized classification, i.e., of suspended treaties.

A treaty either falls or survives the impact of war, none is "suspended." After peace is declared a pre-war treaty either is in force, or it is not. It can have no other status. The authorities as well as the practice of nations recognize that some treaties, by operation of law, are unaffected by war, and therefore survive. All other treaties,

by operation of law, are annulled by war, and do not survive.

Convincing support of these views is found in the language structure of Article 44 of the Peace Treaty of 1947 between the United States and Italy which makes provision for only two classifications of treaties, those which the nation "desires to KEEP in force," and those which the nation "desires to REVIVE." No provision is made therein for "suspended treaties."

Therefore, this Court's finding, that subject treaty was merely "suspended," must, of necessity, be regarded as a finding that the treaty did survive the war. In either case, the conclusion is wholly untenable. Finding, subject treaty as having been suspended by war violates the mutual understanding of the two nations as evidenced by the language of their Peace Treaty of 1947. And, regarding such treaty as having survived war, conflicts with universally recognized principles.

Applicable standards to determine whether a particular treaty has, or has not, survived war were conveniently reviewed and conclusively established by the Supreme Court in the *Karnuth* case. It is clear from the conclusions there reached, that treaties having to deal with vested property rights, fixed boundaries and general arrangements aimed at perpetuity are not affected by war. On the other hand, those treaties whose provisions can be carried out only in a continued day by day contact of peaceful relations (e. g., extradition treaty) must necessarily terminate upon the opening of hostilities. That is the doctrine of the *Karnuth* case.

Deciding in that case, that Article III of the Jay Treaty of 1794 granting to subjects of Great Britain and the citizens of the United States the right, freely to pass and repass into the respective territories had been abrogated by

the War of 1812, the high court considered and accepted the following principles:

On page 237,

"* * * treaties of amity, of alliance, and the like, having a political character, the object of which 'is to promote relations of harmony between nation and nation,' are generally regarded as belonging to the class of treaty stipulations that are absolutely annulled by war."

On page 239,

"* * * the privilege accorded by Article III is one created by the treaty, having no obligatory existence apart from that instrument, dictated by considerations of mutual trust and confidence, and resting upon the presumption that the privilege will not be exercised to unneighborly ends. It is, in no sense, a vested right. It is not permanent in its nature. It is wholly promissory and prospective and necessarily ceases to operate in a state of war, since the passing and repassing of citizens or subjects of one sovereignty into the territory of another is inconsistent with a condition of hostility. * * * The reasons for the conclusion are obvious—among them, that otherwise the door would be open for treasonable intercourse. And it is easy to see that such freedom of intercourse also may be incompatible with conditions following the termination of war. Disturbance of peaceful relations between countries occasioned by war, is often so profound that the accompanying bitterness, distrust and hate indefinitely survive the coming of peace. The causes, conduct or result of the war may be such as to render a revival of the privilege inconsistent with a new or altered state of affairs. The grant of the privilege con- (p. 240) -notes the existence of normal, peaceful relations. When these are broken by war, it is wholly problematic whether the ensuing peace will be of such character as to justify the neighborly freedom of intercourse which prevailed before

the rupture. It follows that the provision belongs to the class of treaties which does not survive war * * *."

On page 241,

"* * * a state of war puts an end to treaties concluded with a view to peaceful relations between the signatories and the object or end of which is to strengthen or maintain such peaceful relations, for example, treaties of alliance, subsidies, guarantees, commerce, navigation, customs, union, etc. Those treaties from their very nature are subject to an implicit resultory condition, namely a break in the state of peace. They can not survive the outbreak of hostilities between the signatory States. War, to them is a cause of final extinction and not mere suspension. When peace is concluded, they do not spontaneously come out of a comatose state; they do not revive unless renewed in the peace treaty."

After thoughtful study of the foregoing principles, the court reached its decision on page 241, stating that,

"* * * these expressions and others of similar import which might be added, confirm our conclusion that the provision of the Jay Treaty now under consideration was brought to an end by the War of 1812 * * *."

With the aid of the foregoing standards, there is no difficulty in recognizing subject extradition treaty as one heading the list of those treaties which do not survive war. It is political in character—it does not relate to vested property or boundaries—it is designed to promote harmony—it is based on mutual trust and confidence—its terms can be performed only during the continuance of peaceful relations—its intrinsic character is wholly incompatible with war—for national safety, it must cease to operate when war begins—and when hostilities start, all doors to the enemy are closed.

War, to the extradition treaty, was the cause of its final extinction. It was annulled and abrogated. And, since it is conceded, by appellees, and recognized by this Court, that it would require under our Constitution, the concurring action of the President and of the Senate to re-enact a treaty once dead, and that such constitutional requirements were not observed, it follows that there now exists no treaty upon which an extradition proceeding can be predicated.

The judicial doctrine, holding governmental action with respect to a treaty, must be regarded as of controlling importance in determining whether such treaty has ever been terminated, has application ONLY where the treaty has not been "extinguished" or "abrogated."

In *Charlton v. Kelly*, 229 U. S. 447, the extradition treaty with Italy, now before this Court, was attacked. It was there claimed, that the treaty had been broken by Italy's inconsistent executive action in refusing to surrender Italian citizens to the United States, and therefore the United States' obligation thereto had terminated. But, the high court followed the centuries old reasoning that "where a treaty is violated by one of the contracting parties, it rests alone with the injured party to pronounce it broken, the treaty being, in such case, not absolutely void, but voidable at the election of the injured party, who may waive or remit the infraction committed, or may demand a just satisfaction, the treaty remaining obligatory if he chooses not to come to rupture."

After approving and adopting this view the Court held, on page 474:

> "And without considering whether extinguished treaties can be renewed by tacit consent under our constitution, we think that on the question whether this treaty has ever been terminated, governmental

action in respect to it must be regarded as of controlling importance."

Having thus stated applicable principles, and having found that our government, by its action, recognized the treaty as still existing, that court properly declared the treaty had not been abrogated, and therefore its provisions were operative against us.

Likewise, the judicial doctrine, quoted and relied upon by this Court, holding that a construction of a treaty by the political department of government, while not conclusive upon a Court called upon to construe such treaty in a matter involving personal rights is nevertheless of much weight, has application only where the treaty has not been extinguished or abrogated. Where a treaty has been abrogated, it is dead. There is nothing for a court to construe or interpret.

Returning to the propriety, under our Constitution, of reviving an extinguished treaty, we pose the question:

> Can the conduct of the political department of our government, however long continued, operate to revive a treaty once it has been abrogated?

The holdings in *Terlinden v. Ames*, 184 U. S. 270 (1902), in *Charlton v. Kelly*, 229 U. S. 447 (1913) and in *Clark v. Allen*, 331 U. S. 503 (1947) furnish neither an answer nor a solution. In each of these cases the treaty in its entirety or the pertinent provisions thereof was found to be "existing" and not abrogated.

But, the *Karnuth* case does provide a made-to-fit solution. After finding, in that case, that the War of 1812 had abrogated Article III of the Jay Treaty of 1794, the Court was confronted with two impressive facts,—(1) that for more than one hundred years the citizens and subjects of the two countries continued after the War of

1812, as before, freely to pass and repass the international line.—(2) that our government had acquiesced in the continued exercise of such crossing privileges upon the part of the inhabitants of Canada. To the contention that such conduct on the part of our government operated to revive abrogated Article III, the Supreme Court replied on page 242:

> "* * * A presumption that such acquiescence recognized a revival of the treaty obligation cannot be indulged."

Consequently, where a treaty or a provision thereof is once abrogated, and thereafter a hundred years of conduct on the part of our government in acquiescing therein did not operate to revive such treaty or provision thereof, it certainly cannot be successfully maintained, that nine years of such conduct in the instant case could effect such revival.

CONCLUSION.

The method used by the respondents in this extradition case are so highhanded and utterly in disregard of human rights so as to be properly branded improper, illegal, vicious, and if permitted to stand, would set a precedent which is considered in our jurisprudence as reprehensible and a violation of the petitioner's rights to a fair trial and due process of law.

To sum up, what was done here was to forward a demand for a Tommaso Argento and attach a small photograph of a young man which was taken probably forty years ago. But, the identification that these three affidavits spoke of are not of this little photograph of this young man but of a photograph entirely different which was an enlargement of a passport-size photograph which

was made in the United States in 1941 or 1942, about twenty years after this alleged murder. This passport-size photograph was surreptitiously taken by someone and a blow-up was made of it and sent to Italy during the time of a recess in this very hearing before the Commissioner, and this is the photograph that is being identified by three people who haven't seen this man in more than thirty years. One of these identifiers is Fr. Giuseppe Camelleri, a brother of the deceased, undoubtedly a prime mover herein.

Then another attempt is made by introducing a police officer who identifies fingerprints of Tommaso Argento. But are these fingerprints that were taken of the Tommaso Argento in Italy before he left Italy and to be compared to fingerprints taken here? No, is the answer. Both of these fingerprints purportedly made in 1941 or 1942 were surrepetitiously taken from the files of the United States Alien Registration Office and compared with fingerprints taken of Tommaso Argento at the date of this extradition hearing in Cleveland. Now, of what value can such fingerprints be to the identification of the Tommaso Argento who allegedly was convicted in absentia in Italy in 1931? What value can the Commissioner or the Court place upon identification of such fingerprints? These fingerprints and the photograph were taken in the United States many, many years after the alleged commission of the crime and the conviction in absentia but are useless because they cannot be compared with fingerprints of the alleged Argento. Aside from cluttering up the record what other possible use for identification purposes that this man is the same one who left Italy in 1925 or 1926 and was convicted in absentia in 1931?

To be perfectly fair and frank, the identification of these fingerprints and the blown-up photograph is only

that a Tommaso Argento had his fingerprints taken in the United States in 1941 or 1942 and had his picture attached to a United States document about that time. But certainly it cannot help us or aid the Court in any way to arrive at the conclusion that by these fingerprints and by this photograph it is established that this is the right man who was convicted in Italy and that the Italian Government wants.

It is our contention that the Court erred by admitting any of this evidence over objection of counsel, which was timely and proper.

Secondly, the other errors that were committed by the Court are as follows:

1. By holding that the treaty on extradition between the United States and Italy was valid; thereby holding that the Commissioner was within his jurisdiction to hear and decide the extradition proceedings.

2. We contend that the warrant that was issued was illegal; that Exhibits G1, G2 and G3 are not legal evidence, which admission is reversible error.

3. That Exhibits H, H1, H2, and H3, Exhibit F and Exhibits J, K and K1 are not legal evidence and their admission over objection of counsel is reversible error.

4. That the testimony of Police Officer Benasek was not legal evidence and was erroneously admitted over objection.

That because of the above reasons and grounds, the petitioner did not receive a fair trial in accordance with law and that therefore the detention of the petitioner is unlawful and is without due process of law and in violation of his constitutional rights, and therefore is illegal.

RELIEF PRAYED FOR.

This Honorable Court is respectfully urged to find and adjudge that no proper identification of the petitioner was made; that there is not before the Court any proper and legal evidence that would establish the identity of the petitioner as the one convicted in absentia and the one that is being demanded by the Government of Italy; that the evidence both in quality and quantity is not sufficient in law upon which to base an extradition warrant and order.

This Court is further respectfully urged to find and adjudge that there was no legal evidence to sustain the findings and order of the Court below; to enter an order reversing and setting aside the findings and judgment of the Court below; and to enter an order dismissing the warrant of arrest and ordering the petitioner to be discharged.

Respectfully submitted,

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APPENDIX.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided February 12, 1957.)

Before SIMONS, Chief Judge, MCALLISTER and STEWART, Circuit Judges.

STEWART, Circuit Judge. Upon application of the Republic of Italy, certified by the Secretary of State of the United States, and upon complaint of the Italian Consul for Ohio and Kentucky, extradition proceedings were initiated against the appellant in the United States District Court for the Northern District of Ohio. After a hearing pursuant to 18 U. S. C. A., § 3184, the United States Commissioner concluded that the evidence was sufficient to sustain the charge that the appellant was the same Tommaso Argento who had been convicted *in absentia* and sentenced to life imprisonment in Italy in 1931 for a murder committed there in 1922.[1] The Commissioner accordingly committed the appellant to custody pending surrender to the Republic of Italy. By writ of habeas corpus and action for declaratory judgment, the appellant attacked the legality of his arrest, commitment and detention. This appeal is from the judgment of the district court upholding the Commissioner's order.[2]

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[1] Since the Italian conviction was *in absentia*, the Commissioner correctly treated the case as though the appellant had been charged with and not convicted of a crime in Italy. See IV Hackworth, *Digest of International Law* (1942) 52, 132.

[2] This is an appeal only in the declaratory judgment action, no appeal having been taken from the court's denial of a writ of habeas corpus, 131 F. Supp. 538 (1955). The propriety of an action for declaratory judgment to test the legality of a completed extradition hearing is open to serious question. For purposes of this case, however, we shall assume all questions considered by the district court are properly before us.

Appellant's primary demand for freedom is based upon a most fundamental contention. It is his claim that there exists no valid extradition treaty between the United States of America and the Republic of Italy, and that in the absence of such a treaty, there is no legal authority for the surrender to Italy of a fugitive in the United States. The appellant also contends that several items of evidence were improperly admitted by the Commissioner, and that if they had been excluded, there would have been no evidence to connect him with any crime committed in Italy.

Without question the appellant is on sound ground in asserting that he cannot be extradited to Italy in the absence of a valid treaty so providing. That the Executive is without inherent power to seize a fugitive criminal and surrender him to a foreign nation has long been settled. *Valentine v. United States, ex rel. Neidecker*, 299 U. S. 5 (1936); see *Factor v. Laubenheimer*, 290 U. S. 276 (1933).

While Congress might conceivably have authorized extradition in the absence of a treaty, it has not done so. The law is clear. Title 18 U. S. C. A., § 3181, states, "The provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such foreign government." This condition is repeated in 18 U. S. C. A., § 3184, making the provisions of that section operable only "whenever there is a treaty or convention for extradition between the United States and any foreign government."

As to the existence of a valid extradition treaty between the United States and Italy, the parties are in agreement upon the underlying facts. They differ completely in the conclusions to be drawn from them.

A treaty of extradition was concluded between the two nations in 1868, 15 Stat. 629. Valid amendments were made to the treaty in 1869 and 1885, 16 Stat. 767 and 24 Stat. 1001. Murder was one of the crimes made extraditable by the treaty.

On December 11, 1941, the Congress of the United States declared that a state of war existed between the United States and Italy. At the conclusion of the war a treaty of peace was concluded, effective September 15, 1947. 61 Stat. 1245. This peace treaty, which was duly ratified by the United States Senate, provided in Article 44 as follows:

> "1. Each Allied or Associated Power will notify Italy, within a period of six months from the coming into force of the present Treaty, which of its pre-war bilateral treaties with Italy it desires to keep in force or revive. Any provisions not in conformity with the present Treaty shall, however, be deleted from the above-mentioned treaties.
>
> "2. All such treaties so notified shall be registered with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations.
>
> "3. All such treaties not so notified shall be regarded as abrogated." 61 Stat. 1386.

On February 6, 1948, the Secretary of State of the United States notified the Republic of Italy that the United States desired to keep in force or revive, among others, the Extradition Treaty of 1868, as amended.

It is the appellant's position that under established principles of international law the outbreak of war between Italy and the United States in 1941 operated to abrogate completely the extradition treaty previously existing between the two nations. That being so, the appellant argues that in order to revive the extradition

treaty it was necessary to make a new treaty, and that a new treaty under the Constitution of the United States could have been made only by the President, with the explicit concurrence of the Senate by a two-thirds vote. U. S. Const., Article II, Section 2. The appellees concede in their brief, as they obviously must, "that it would * * * require the concurring action of the President and the Senate to re-enact a treaty once dead as distinguished from one which is dormant or held in abeyance. * * *"

Whether the war between Italy and the United States completely annulled the previous extradition treaty is thus the central question before us. If the war did have that effect, the appellant is correct in his position that there is now no treaty of extradition between the two nations, since it is conceded that the "notification" of February 6, 1948, was not submitted to the United States Senate for its advice and consent.

Early publicists adopted the view that war *ipso facto* abrogates all treaties between the belligerent nations.[1] In more recent times, however, this theory has been rejected by the textwriters in international law,[2] and it seems

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[1] See Lenoir, "The Effect of War on Bilateral Treaties, with Special Reference to Reciprocal Inheritance Treaty Provisions," 34 Georgetown L. R. 129 (1946), where citations to the views of the earlier writers upon this question are collected in footnote 9. The reasoning in support of this view is expressed in 3 Vattel, *The Law of Nations*, Section 175 (trans. of ed. 1758, Fenwick, 1916), which is there quoted: "Conventions and treaties are broken and annulled when war breaks out between the transacting parties, either because such agreements imply a state of peace, or because each party, having the right to deprive the enemy of his property, may take from him such rights as have been given him by treaties."

[2] "[T]he farther back we go, the more sweeping and undiscriminating are the assertions that all treaties are abrogated by the outbreak of war between the contracting parties, and the passage of time brings with it the realization that there are many exceptions to this statement." McNair, *The Law of Treaties*, page 532 (1938).

never to have been espoused by courts in the United States.

The question was first considered by the Supreme Court in *Society for the Propagation of the Gospel v. New Haven*, 8 Wheaton 464 (1823). Although *dicta*, the views the Court there expressed have never since been questioned:

> "But we are not inclined to admit the doctrine urged at the bar, that treaties become extinguished, *ipso facto*, by war between the two governments, unless they should be revived by an express or implied renewal on the return of peace. Whatever may be the latitude of doctrine laid down by elementary writers on the law of nations, dealing in general terms, in relation to this subject, we are satisfied, that the doctrine contended for is not universally true. There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial, and other national rights, or which, in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation, to hold them extinguished by the event of war. * * * We think, therefore, that treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace." *Society for the Propagation of the Gospel v. New Haven*, 8 Wheaton 464, at 494 (1823).

This statement was cited as basic law in the United States as recently as 1947 in *Clark v. Allen*, 331 U. S. 503 (1947), where it was said, "We start from the premise

that the outbreak of war does not necessarily suspend or abrogate treaty provisions." 331 U. S., at 508.

While it is therefore settled, at least in this country, that all treaties are not automatically abrogated by the outbreak of war between the parties, it is not easy to postulate an applicable standard to determine whether a particular treaty has survived a war. The difficulty was stated more definitely than was the solution in *Karnuth v. United States*, 279 U. S. 231, at 236 (1929):

> "The effect of war upon treaties is a subject in respect of which there are widely divergent opinions. The doctrine sometimes asserted, especially by the older writers, that war *ipso facto* annuls treaties of every kind between the warring nations, is repudiated by the great weight of modern authority; and the view now commonly accepted is that 'whether the stipulations of a treaty are annulled by war depends upon their intrinsic character.' 5 Moore's Digest of International Law, § 779, p. 383. But as to precisely what treaties fall and what survive, under this designation, there is lack of accord. The authorities, as well as the practice of nations, present a great contrariety of views. The law of the subject is still in the making, and, in attempting to formulate principles at all approaching generality, courts must proceed with a good deal of caution. But there seems to be fairly common agreement that, at least, the following treaty obligations remain in force: stipulations in respect of what shall be done in a state of war; treaties of cession, boundary, and the like; provisions giving the right to citizens or subjects of one of the high contracting powers to continue to hold and transmit land in the territory of the other; and, generally, provisions which represent completed acts. On the other hand, treaties of amity, of alliance, and the like, having a political character, the object of which 'is to promote relations of harmony between

nation and nation,' are generally regarded as belonging to the class of treaty stipulations that are absolutely annulled by war. Id., p. 385, quoting Calvo, Droit Int. (4th Ed.), IV. 65, § 1931."

Counsel have cited us to no decision, and we have found none, specifically relating to the effect of war upon a treaty of extradition. Such a treaty does not conveniently fit into either of the alternative classifications set out in the *Karnuth* opinion quoted above. If the question were to be decided in a vacuum, the conclusion could only be that it is extremely doubtful that war *ipso facto* abrogates a treaty of extradition. Fortunately, however, the question need not be so decided, but can and must be decided against the background of the actual conduct of the two nations involved, acting through the political branches of their governments.

In *Terlinden v. Ames*, 184 U. S. 270 (1902), where the question for decision was whether an extradition treaty between the United States and the Kingdom of Prussia had survived the absorption of Prussia into the German Empire, it was contended that this treaty "had been terminated by operation of law" as the result of the formation of the German Empire. In deciding that the treaty had survived, the Court relied heavily upon the intention of the parties as revealed by the conduct of their executive departments. "* * * [W]e think that on the question whether this treaty has ever been terminated, governmental action in respect to it must be regarded as of controlling importance." 184 U. S., at 285. "* * * [I]t cannot be successfully contended that the courts could properly intervene on the ground that the treaty under which both governments had proceeded, had terminated by reason of the adoption of the constitution of the Ger-

man Empire, notwithstanding the judgment of both governments to the contrary." 184 U. S., at 289-290.

The consummation of the treaty of peace with Italy in 1947 containing Article 44 providing for "notification" by the United States of each pre-war bilateral treaty it desired to keep in force or revive, the ratification of that treaty by the United States Senate, the subsequent notification by our State Department with regard to the extradition treaty, and the conduct of the political departments of the two nations in the ensuing nine years, evidencing their unqualified understanding that the extradition treaty is in full force and effect, all make it obvious that the political departments of the two governments considered the extradition treaty not abrogated but merely suspended during hostilities. There is, to be sure, a certain circuity of reasoning in deciding that the parties did not need to make a new treaty of extradition for the reason that they did not in fact make one. Yet, it is exactly that pragmatic and cautious approach that, if the question is doubtful, the authorities enjoin. *Terlinden v. Ames*, 184 U. S. 270, *supra*: "A construction of a treaty by the political department of the Government, while not conclusive upon a court called upon to construe such a treaty in a matter involving personal rights, is nevertheless of much weight." *Charlton v. Kelly*, 229 U. S. 447, at 468 (1913). See Judge Mack's scholarly opinion in *The Sophie Rickmers*, 45 F. (2d) 413 (S. D. N. Y., 1930), and Judge Cardozo's eloquent discussion in *Techt v. Hughes*, 229 N. Y. 222, 128 N. E. 185 (1920).

It is our conclusion that the treaty of extradition between the United States and Italy was not terminated but merely suspended during the war, and that it is now in effect.

We turn briefly to the claim that the Commissioner improperly admitted evidence identifying the appellant as the Tommaso Argento who had been charged in Italy with murder.[5] This evidence consisted of the sworn statements of three individuals in Italy identifying two photographs, and of records relating to the appellant which had been filed under the now repealed Alien Registration Act of 1940, 54 Stat. 670; compare 8 U. S. C. A., § 1302, and which were produced at the hearing by an employee of the Naturalization and Immigration Service of the United States Department of Justice.

The sworn statements were taken *ex parte* in Italy without the knowledge of the appellant or his counsel. They were obviously hearsay, and clearly would have been inadmissible in a criminal trial in the United States. But that is not the test. The only question to be answered under the statute is whether the statements were "properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals," of Italy. 18 U. S. C. A., § 3190. *Bingham v. Bradley, U. S. Marshal*, 241 U. S. 511, 517 (1916). It was the unambiguous testimony of an expert in Italian law that they were.

Although this evidence was properly admitted, however, its sufficiency to identify the appellant would be extremely doubtful without the additional evidence contained in the records filed under the Alien Registration Act. The appellant contends that those records, and copies made from them, were improperly admitted, because Congress has expressly made them confidential, to be released

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[5] The entire authenticated record of the trial proceedings in Italy was before the Commissioner, and the appellant apparently does not question the sufficiency of that evidence to sustain the charge that a Tommaso Argento had been convicted *in absentia* of committing a murder in Italy.

only by the Attorney General.[*] The appellant correctly points out that there was no showing before the Commissioner that the Attorney General had consented to the production of the records in question.

It is unnecessary to consider whether rejection of the records would have been the appropriate sanction to apply if there had been an affirmative showing that the Attorney General had not consented to their production. We are of the view that the appellant's contention cannot prevail for the reason that, since there was no such showing, it must be presumed that the Attorney General did consent. *United States v. Chemical Foundation*, 272 U. S. 1, 14-15 (1926).

The appellant has apparently been a law-abiding person during the thirty years that he has been in this country. To enter a judgment that will result in sending him back to life imprisonment in Italy, upon the basis of the record before the Commissioner, does not sit easily with the members of a United States court, sensible of the great Constitutional immunities. For the reasons expressed in this opinion, however, we conceive it our obligation to do so. As correctly stated by District Judge Connell, "The guaranties [the appellant] seeks in this country have no relation to offenses which have been committed within the jurisdiction of the demanding country." *Neely v. Henkel*, 180 U. S. 109 (1901).

The judgment of the district court is affirmed.

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[*] "All registration and fingerprint records made under the provisions of this subchapter shall be confidential, and shall be made available only to such persons or agencies as may be designated by the Attorney General." 8 U. S. C. A., § 1304 (b).

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed February 12, 1957.)

Appeal from the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

ORDER DENYING PETITION FOR REHEARING.

(Filed April 8, 1957.)

The petition for rehearing is denied.

OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE DISTRICT COURT.

(Filed November 30, 1955.)

CONNELL, *J.*:

Plaintiff herein brings Petition for Declaratory Judgment under Title 18, Section 3184, U. S. Code and Sections 2201 and 2202 of the U. S. Code, against Defendants United States Commissioner Herbert A. Horn, U. S. Marshal Xavier North and Folco Zugaro as Consul of the Republic of Italy, claiming that he has been illegally restrained of his liberty on an order of arrest and process for extradition to Italy.

Plaintiff claims that the U. S. Commissioner admitted improper evidence against him in a proceeding in extradi-

tion, and that the Commissioner made a finding against him which was not based on sufficient evidence, and that such claimed improper and insufficient evidence did not support the Commissioner's Order which remanded Plaintiff to the custody of the U. S. Marshal for extradition to Italy.

Findings of Fact.

It is the finding of this Court that the evidence adduced before the Commissioner was properly admitted in all respects. It is our finding that it was proper for the Commissioner to receive into evidence the affidavits of 3 witnesses in Italy who claimed to have known the Plaintiff there, and to receive in evidence their affidavit against him to the effect that the photograph which they identified as that of the Plaintiff, and which had been forwarded to Italy after having been taken of the Plaintiff in the United States some years ago, was the picture of that certain man who had been convicted in absentia in Italy of the crime of murder many years ago. The Court finds that such evidence in particular, and the three affidavits in general, and all evidence on the subject of identification, to have been properly received.

The Court further find that from such three affidavits and from all the evidence, that the Commissioner had reasonable ground to believe that the Plaintiff was the person for whom extradition is here sought.

Conclusions of Law.

The Court finds that the Plaintiff's complaint that his constitutional rights were violated by the Defendants in the deprivation of his constitutional guaranties has no foundation in law. It is the Court's conclusion that Plaintiff has been here properly identified as the perpetrator of

a crime committed in Italy many years ago, which country now asks for his extradition thereto. The Court concludes that the evidence adduced against him was proper and sufficient. The Court further concludes that in the forum from which Plaintiff appears to have fled, Plaintiff must seek his rights, because the guaranties he seeks in this country have no relation to offenses which have been committed within the jurisdiction of the demanding country, as was decided in *Neely vs. Henkel*, 180 U. S. 109, 45 L. Ed. 448.

For the foregoing reasons, Petition for Declaratory Judgment is denied.

/s/ JAMES C. CONNELL,
United States District Judge.

November 30, 1955.